No. 18-16663

IN THE

United States Court of Appeals for the Ninth Circuit

CITY OF OAKLAND, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Oakland City Attorney Barbara J. Parker; CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the San Francisco City Attorney Dennis J. Herrera,
Plaintiffs-Appellants,

v.

B.P. P.L.C., a public limited company of England and Wales;
CHEVRON CORPORATION, a Delaware corporation;
CONOCOPHILLIPS, a Delaware corporation;
EXXON MOBIL CORPORATION, a New Jersey corporation;
ROYAL DUTCH SHELL PLC, a public limited company of England and Wales;
and DOES, 1 through 10
Defendants-Appellees.

On Appeal from The United States District Court, Northern District of California
Case Nos. 3:17-cv-06011-WHA, 3:17-cv-06012-WHA (Hon. William H. Alsup)

ANSWERING BRIEF OF DEFENDANT-APPELLEE CHEVRON CORPORATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant Chevron Corporation states that it has no parent corporation, and there is no publicly held corporation that owns 10% or more of Chevron Corporation's stock.

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INTRODUCTION

Plaintiffs seek to extract billions of dollars from five publicly traded energy companies on the theory that Defendants are responsible for global warming and should be held liable under state-law nuisance doctrine. But state tort law is not an appropriate vehicle—and state courts are not an appropriate forum—for regulating worldwide energy policy or punishing lawful, global commercial activity that is vital to every sector of the global economy. The district court properly excercised federal jurisdiction over Plaintiffs' inherently federal-law claims and dismissed those claims for failure to state a cognizable cause of action.

First, Plaintiffs mooted any challenge to the district court's exercise of removal jurisdiction by voluntarily amending their complaints to assert federal common law causes of action in addition to their state common law claims, and to add new Plaintiffs asserting those same federal claims. That strategic decision by Plaintiffs created an independent basis for the district court's subject matter jurisdiction before the court granted Defendants' motions to dismiss, obviating appellate review of the initial removal. *Retail Prop. Tr. v. United Bd. of Carpenters & Joiners*, 768 F.3d 938, 949 n.6 (9th Cir. 2014). In any event, the district court correctly denied Plaintiffs' remand motion because Plaintiffs' "claims—which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law." ER29. As the

Supreme Court has repeatedly held, a claim "'arises under' federal law if the dispositive issues stated in the complaint require the application of federal common law," *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) ("*Milwaukee I*"), and Plaintiffs' "transboundary pollution" claims plainly necessitate the uniform rule of decision inherent in federal common law, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012).

Second, the district court properly dismissed Plaintiffs' claims. The Supreme Court's decision in *American Electric Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"), and this Court's decision in *Kivalina* make clear that the Clean Air Act ("CAA") has displaced any federal common law remedy for claims based on alleged harms resulting from domestic greenhouse gas emissions, regardless whether the plaintiff seeks injunctive relief or damages. ER19. Plaintiffs attempted to distinguish their claims from those brought in *Kivalina* by asserting that they were based on third-party emissions resulting from Defendants' production and sale of fossil fuels, rather than on Defendants' own emissions, but the district court recognized that this illusory distinction was not "enough to avoid displacement." ER19. The court also properly heeded the Supreme Court's admonition to "exercise great caution before fashioning federal common law in areas touching on foreign affairs," ER25, by declining to create a novel remedy to address alleged injuries caused by Defendants' foreign conduct and overseas emissions, which are "out of

the EPA and [CAA's] reach," ER19; *see Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018). Nor can Plaintiffs' "wrongful promotion" allegations salvage their claims because the harms alleged here stem from emissions, not Defendants' alleged "promotion" of fossil fuels *simpliciter*, and in any event, the alleged promotion is constitutionally protected speech. Accordingly, this Court should affirm.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because Plaintiffs asserted federal claims in their amended (operative) complaints. The district court also had jurisdiction because these cases were properly removed under 28 U.S.C. §§ 1331, 1333(1), 1334, 1441, 1442(a), 1452(a), and 43 U.S.C. § 1349. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether this Court should affirm the remand order because Plaintiffs mooted any challenge to removal when they voluntarily amended their complaints to assert federal common law claims, or, alternatively, because Plaintiffs' global warming claims were properly removed.

2. Whether the district court correctly dismissed Plaintiffs' claims under Rule 12(b)(6).

STATEMENT OF THE CASE

I. Global warming is an issue of national and international significance. For decades it has been the subject of federal laws and regulations, political negotiations, and international diplomatic engagement. As early as 1978, Congress established a "national climate program" to improve the country's understanding of global warming through enhanced research, information collection and dissemination, and international cooperation. *See* National Climate Program Act of 1978, 15 U.S.C. § 2901 *et seq.* In the Global Climate Protection Act of 1987, Congress recognized the uniquely international character of global warming and directed the Secretary of State to coordinate negotiations on the issue. *See* 15 U.S.C. § 2901 note; *see also id.* § 2952(a).[1]

Through the CAA, Congress established a comprehensive scheme to promote and balance multiple objectives, deploying resources to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1); *id.* § 7411

[1] Congress has since revisited global warming many times. *See, e.g.*, Global Change Research Act of 1990, 15 U.S.C. § 2921 *et seq.* (establishing research program for global climate issues); Energy Policy Act of 1992, 42 U.S.C. § 13384 (directing Secretary of Energy to conduct greenhouse gas assessments and report to Congress); Energy Policy Act of 2005, 42 U.S.C. § 13389(c)(1) (seeking further reductions of greenhouse gas emissions at national level); Energy Independence and Security Act of 2007, 42 U.S.C. § 17001 *et seq.* (same).

(providing for uniform national emission standards for stationary sources); *id.* § 7521 (vehicle emissions). Congress authorized the United States Environmental Protection Agency ("EPA") to regulate air pollutants such as greenhouse gas emissions, and the EPA has exercised this authority on its own and with other federal agencies. *See id.* § 7601; *Regulations for Greenhouse Gas Emissions from Passenger Cars and Trucks*, U.S. EPA, http://bit.ly/2EWvcKK.

II. On September 19, 2017, the city attorneys for San Francisco and Oakland, on behalf of the People of the State of California, filed Complaints in state court for public nuisance against five energy companies—BP p.l.c., Chevron Corporation, ConocoPhillips Company, Exxon Mobil Corporation, and Royal Dutch Shell plc. ER288; ER415. The complaints allege that "[s]cientists have known for many years that the use of fossil fuels emits carbon dioxide[,] that carbon dioxide is a greenhouse gas," and that increased carbon dioxide concentrations in the atmosphere could lead to global temperature increases. ER304 ¶39; *see also* ER304-06 ¶¶40-48. Plaintiffs allege that global fossil-fuel combustion over the past several hundred years has increased the atmospheric concentrations of greenhouse gases, resulting in temperature increases. ER306-07 ¶¶49-50. These temperature increases are allegedly causing sea levels to rise. ER307-08 ¶¶51-52. Plaintiffs assert that Defendants have known all this for several decades, ER310-15 ¶¶57-62, yet

nevertheless continued to produce and promote fossil fuels around the globe. ER316-20 ¶¶64-77.

Plaintiffs alleged that global warming is harming San Francisco and Oakland, and they project that these injuries will become more severe over the next 80 years, requiring sea walls and other prophylactic measures. ER323-29 ¶¶85-93. Plaintiffs sought "an order of abatement requiring Defendants to fund a climate change adaptation program" for each city. ER331 ¶99.[2]

III. Defendants removed these actions to the Northern District of California, where they were subsequently related and assigned to Judge William H. Alsup. ER203, ER239. Plaintiffs moved to remand, but the district court denied Plaintiffs' motion, holding that the claims were necessarily governed by federal common law." ER29. As the court explained, "[i]f ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints." ER 30. "Taking the complaints at face value, the scope of the worldwide predicament demands the most comprehensive view available, which in our American court system means our federal courts and our federal common law. A

[2] Plaintiffs seek to hold Defendants liable for the activities of their subsidiaries and affiliates. *See, e.g.*, ER64 ¶18. Defendants assume *arguendo* that this erroneous premise is correct.

patchwork of fifty different answers to the same fundamental global issue would be unworkable." ER31.

The court *sua sponte* certified the remand order for interlocutory review under 28 U.S.C. § 1292(b). ER34. Plaintiffs declined to seek such review from this Court.

IV. After the district court denied remand, the Court set a briefing schedule for motions to dismiss. SER14. Shortly after those motions were filed, Plaintiffs voluntarily amended their complaints in response to arguments Defendants had raised. ER56, ER128. The amended complaints each added a new plaintiff (the City and County of San Francisco, and the City of Oakland, acting on their own behalf), and those new plaintiffs asserted claims *exclusively* under federal common law. ER63 ¶14; ER135 ¶14. The amended complaints also continued to assert claims on behalf of the People of the State of California, this time under both federal common law and California law. ER63 ¶15; ER115-17 ¶¶137-48; ER135 ¶15; ER180 ¶¶137-48.

V. Defendants moved again under Rule 12(b)(6) to dismiss the Amended Complaints, and the district court granted Defendants' motions. ER3. The court explained that "a successful public nuisance claim … requires proof that a defendant's activity unreasonably interferes with the use or enjoyment of a public right and thereby causes the public-at-large substantial and widespread harm." ER17 (citing *Kivalina*, 696 F.3d at 855). The court concluded, however, that it was

precluded from undertaking that complex balancing because there was "a more direct resolution from the Supreme Court and [the Ninth Circuit]." ER18.

The court first observed that "the Clean Air Act and the EPA's authority thereunder to set emission standards have displaced federal common law nuisance claims to enjoin a defendant's emissions of greenhouse gases." ER19 (citing *AEP*). And *Kivalina* "extended the Clean Air Act displacement rule to claims for damages based on an oil producer's *past* emissions." ER19. The court held that although Plaintiffs sued Defendants "not for their own emissions of greenhouse gases, but for their sale of fossil fuels to those who eventually burn the fuel," "*AEP* and *Kivalina* … still apply" to claims predicated on domestic emissions. ER19.

In addition, to the extent Plaintiffs' claims arise from "conduct and emissions" occurring "*outside* the United States," such foreign emissions are not governed by the CAA. ER19. Relying on *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), and *Jesner*, the court held that "federal courts should exercise great caution before fashioning federal common law in areas touching on foreign affairs." ER25. Because Plaintiffs seek "billions of dollars to abate the localized effects of an inherently global phenomenon," the court concluded that the claims "undoubtedly implicate the interests of countless governments, both foreign and domestic." ER21.

The court thus held that "the worldwide problem of global warming should be determined by our political branches, not by our judiciary." ER25.

VI. On July 27, 2018, the district court granted the motions filed by the four non-resident Defendants to dismiss for lack of personal jurisdiction and entered judgment. ER1-3.

STANDARD OF REVIEW

This Court reviews *de novo* orders denying remand, *Hamilton Materials, Inc. v. Dow Chem. Corp*., 494 F.3d 1203, 1206 (9th Cir. 2007), and dismissing for failure to state a claim, *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1117 (9th Cir. 2018). The Court "may affirm the district court on any basis supported by the record." *Bill v. Brewer*, 799 F.3d 1295, 1299 (9th Cir. 2015).

SUMMARY OF ARGUMENT

I.A. Plaintiffs mooted their challenge to the district court's decision to deny remand by voluntarily adding new parties and asserting federal claims in their amended complaints, thereby ensuring that the "federal jurisdictional requirements [we]re met at the time judgment [was] entered." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 64 (1996).

I.B Even if the removal question were not moot, this Court should affirm because Plaintiffs' claims were properly removed on numerous grounds.

Plaintiffs' global-warming claims "are necessarily governed by federal common law," ER29, because they implicate uniquely federal interests and because the interstate or international nature of the controversy makes it inappropriate for

state law to control. Because global-warming claims are predicated on greenhouse gas emissions from sources in every state (and worldwide), the Supreme Court, the Second Circuit, and this Court have held that such claims arise under federal law.

Plaintiffs contend that federal common law does not govern these claims because they have sued Defendants for their fossil-fuel *production* rather than their emissions, but the "problem described by the complaints" is alleged to have been caused by the "combustion of fossil fuels" and resulting greenhouse gas emissions. ER30-31. The well-pleaded complaint rule is no barrier to removal because a claim "'arises under' federal law"—no matter how it is pleaded—"if the dispositive issues stated in the complaint require the application of federal common law." ER34. Plaintiffs argue that federal common law does not govern their claims because the CAA has displaced it. But displacement merely means there is no longer an available *remedy* under federal common law, and the absence of a remedy does not affect subject matter jurisdiction.

Defendants properly removed these cases on several other grounds as well. Plaintiffs' claims arise under federal law because they necessarily raise disputed and substantial questions of federal law, *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), and because they are completely preempted by the CAA. The claims were also properly removed under the Outer Continental Shelf Lands Act ("OCSLA"), the federal officer removal statute, the federal enclave

doctrine, and the bankruptcy removal statute. Plaintiffs' claims also fall within the district court's admiralty jurisdiction. The Court could affirm on any of these grounds.

II. The district court properly dismissed Plaintiffs' claims. To the extent the claims address domestic greenhouse gas emissions, the CAA displaced any federal common law remedies; Plaintiffs do not dispute that. AOB.30. "If an oil producer cannot be sued under the federal common law for [its] own emissions, *a fortiori* [it] cannot be sued for someone else's." ER19. And to the extent Plaintiffs' claims target overseas conduct, they are not viable under federal common law. The Supreme Court has instructed that "federal courts should exercise great caution before fashioning federal common law in areas touching on foreign affairs." ER25; *see Jesner*, 138 S. Ct. at 1402. As the district court correctly recognized, Plaintiffs' claims "undoubtedly implicate the interests of countless governments, both foreign and domestic." ER21. Because the relief Plaintiffs seek "would effectively allow plaintiffs to govern conduct and control energy policy on foreign soil," the court correctly dismissed the claims. ER21.

Plaintiffs contend their claims are based on Defendants' alleged attempts to downplay the risks of global warming, but their "promotion" allegations fail for the further reason that the First Amendment and *Noerr-Pennington* preclude liability based on any such political activity. For this reason, Plaintiffs told the district court

that these promotion allegations are not a standalone basis for liability but are merely a "plus factor" to weigh in their favor as part of the traditional nuisance balancing test. ER16. Thus, these allegations do not change the nature of this case or save Plaintiffs' claims from dismissal.

ARGUMENT

I. This Court Should Affirm the Remand Order

A. The Question Whether These Cases Were Properly Removed Is Moot

Two weeks after Defendants filed motions to dismiss and five weeks after the district court denied Plaintiffs' remand motions, Plaintiffs filed amended complaints that added new parties—the cities of Oakland and San Francisco, acting on their own behalf—asserting *exclusively* federal claims. ER115, 180 ¶¶137-42. The amended complaints also asserted federal claims on behalf of the original Plaintiffs, the People of the State of California, in addition to their state law claims. The district court subsequently granted Defendants' motions to dismiss and entered judgment. In light of Plaintiffs' decision to add parties and assert federal claims, the question whether Plaintiffs' state-law claims were properly removed is now moot. *Retail Prop.*, 768 F.3d at 949 n.6; *see also Local Union 598 v. J.A. Jones Const. Co.*, 846 F.2d 1213, 1215 (9th Cir. 1988).

Ordinarily, "in determining the existence of removal jurisdiction, based upon a federal question, the court must look to the complaint *as of the time the removal*

petition was filed." *Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1117 (9th Cir. 2002) (quoting *O'Halloran v. Univ. of Wash.*, 856 F.2d 1375, 1379 (9th Cir. 1988)). However, the Supreme Court has recognized that when a case proceeds to final judgment, the question on appeal is whether the district court had jurisdiction when entering judgment. *Caterpillar*, 519 U.S. at 76-77; *see also Pegram v. Herdrich*, 530 U.S. 211, 215 n.2 (2000); *Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 700 (1972); *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 16-17 (1951); *cf. Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567 (2004) (recognizing that time-of-filing rule may apply in certain diversity cases).

In *Caterpillar*, the defendant removed under 28 U.S.C. § 1332, even though there was not complete diversity of citizenship. 519 U.S. at 64. The district court erroneously denied plaintiff's remand motion, but the non-diverse defendant settled before trial. *Id.* On appeal, plaintiff argued that the case should be remanded to state court because it was improperly removed. *Id*. The Supreme Court disagreed, holding that "a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met *at the time judgment is entered*." *Id.* (emphasis added); *see also id.* at 77.

This Court applied the same rule in *Retail Property*. There, the plaintiff voluntarily added a federal cause of action after the district court denied its remand motion, and the district court subsequently dismissed plaintiffs' claims and entered

judgment. 768 F.3d at 944-45. On appeal, this Court recognized that "the district court acquired federal question jurisdiction under § 1331," "not because the [defendant] *removed* the case under a complete preemption theory, but because the [plaintiff] *pled* federal question jurisdiction" in its amended complaint. *Id.* at 949. "The question whether the district court erred in denying the [plaintiff]'s motion to remand [was] thus moot, as the [plaintiff's] assertion of federal question jurisdiction in the SAC conferred jurisdiction upon the district court[.]" *Id.* at 949 n.6.[3]

Here, there is no question that the district court had jurisdiction at the time it entered judgment due to Plaintiffs' decision to add new parties and assert federal claims on behalf of all plaintiffs. To be sure, this Court has held that when "a court *orders* the plaintiff to amend its complaint, doing so does not moot the question whether removal to the federal court was proper." *O'Halloran*, 856 F.2d at 1380 (emphasis added). Here, however, the district court did *not* order Plaintiffs to amend, but instead directed Defendants to file motions to dismiss the *original* complaints,

[3] *See also Moffitt v. Residential Funding Co., LLC* 604 F.3d 156, 159 (4th Cir. 2010) ("[I]f a plaintiff voluntarily amends … to allege a basis for federal jurisdiction, a federal court may exercise jurisdiction even if the case was improperly removed."); *Barbara v. N.Y. Stock Exch., Inc.*, 99 F.3d 49, 56 (2d Cir. 1996) ("[I]f a … plaintiff voluntarily amends the complaint to allege federal claims, we will not remand for want of jurisdiction."); *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 185 (7th Cir. 1984) ("[O]nce [the plaintiff] decided to take advantage of his involuntary presence in federal court to add a federal claim to his complaint he was bound to remain there.").

SER14. It was not until *after* Defendants filed their motions to dismiss that Plaintiffs *voluntarily* amended their complaints—invoking their right to amend under FRCP 15(a)(1)(B). SER10.[4]

Although Plaintiffs stated in their amended complaints that they sought "to conform to the Court's ruling and reserve all rights with respect to whether jurisdiction is proper in federal court," ER63 ¶12, Plaintiffs' notification of their intent to amend stated that the amendments were designed "to address purported defects identified by the defendants in their motions to dismiss." SER10.

In any event, the amendments did *not* conform to the remand order. Nothing in the district court's order suggested that Plaintiffs should add new parties asserting *exclusively* federal claims. SER3 ("The City and County of San Francisco and the City of Oakland have been added as plaintiffs on the federal claims (only)."). Critically, those newly added claims *cannot* be remanded to state court, as they did not originate there. Nor did the district court suggest that the original Plaintiffs should amend their complaints to plead both federal *and* state law claims. Indeed,

[4] Moreover, because Plaintiffs "did not raise any claim of coercion in [their] opening brief," they have "waived all argument on this point." *Retail Prop.*, 768 F.3d at 949 n.6.

the decision to assert state-law claims in the amended complaints *conflicted* with the district court's conclusion that Plaintiffs' claims were inherently federal.[5]

Having voluntarily amended their complaints, Plaintiffs mooted the question of whether these cases were properly removed and must now accept the "consequences" of their choice: a decision on the merits in federal court. *Retail Prop.*, 768 F.3d at 949 n.6.

B. Plaintiffs' Original Claims Provided Federal Removal Jurisdiction

In any event, Defendants properly removed Plaintiffs' original claims on numerous grounds.

1. Plaintiffs' Public Nuisance Claims Arise Under Federal Common Law

Tort claims aimed at regulating interstate and international greenhouse gas emissions "are governed by federal common law," ER34, because such claims implicate the "rights and obligations of the United States," "the conflicting rights of States[,]" and "our relations with foreign nations." *Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981). The Supreme Court, this Court, the Second Circuit, the district court below, and the Southern District of New York adjudicating nearly

[5] Plaintiffs' decision to acquiesce to a federal forum—in which they were afforded the opportunity to provide the court with an on-the-record "tutorial on the subject of global warming and climate change," SER16—is consistent with their decision not to seek interlocutory review even though the district court *sua sponte* certified the remand order for immediate review under 28 U.S.C. § 1292(b). ER34.

identical claims against the same five Defendants all have concluded that such claims belong in federal court.

a. Global warming claims based on interstate greenhouse gas emissions are governed by federal common law

Although "[t]here is no federal general common law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), there remain "some limited areas" in which the governing legal rules will be supplied, not by state law, but by "what has come to be known as 'federal common law,'" *Tex. Indus.*, 451 U.S. at 640 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947)). One such area is where "our federal system does not permit the controversy to be resolved under state law" because the subject matter implicates "uniquely federal interests," including where "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Id.* at 640-41; *see also AEP*, 564 U.S. at 421 (federal common law applies to those subjects "where the basic scheme of the Constitution so demands"). This is because the "federal judicial power" must remain "unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters." *Standard Oil*, 332 U.S. at 307.

The paradigmatic example of an inherently interstate or international controversy is a "transboundary pollution suit[]" brought by one state to address pollution emanating from another state. *Kivalina*, 696 F.3d at 855; *see also*

Milwaukee I, 406 U.S. at 103 ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law[.]"). "[S]uch claims have been adjudicated in federal courts" under federal common law "for over a century." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 331 (2d Cir. 2009), *rev'd on other grounds in AEP*, 564 U.S. 410.

Before the Supreme Court's seminal decision in *Erie*, there was no question that "federal common law governed" interstate pollution. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487 (1987); *see, e.g.*, *Missouri v. Illinois*, 200 U.S. 496 (1906); *North Dakota v. Minnesota*, 263 U.S. 365 (1923). After *Erie*, the Court "affirmed the view" that interstate pollution "is a matter of federal, not state, law," and thus that interstate pollution "cases should be resolved by reference to federal common law." *Ouellette*, 479 U.S. at 488 (citing *Milwaukee I*, 406 U.S. at 102 n.3, 107 n.9).

Applying these precedents, the Supreme Court has held that federal common law governs claims asserting global-warming-based injuries resulting from greenhouse gas emissions. *See AEP*, 564 U.S. at 421-22. In *AEP*, New York City and other plaintiffs sued five electric utilities, contending that the "defendants' carbon-dioxide emissions" substantially contributed to global warming, which unreasonably interfered with public rights "in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law." *Id.* at 418. The Second

Circuit held that the case would be "governed by recognized judicial standards under the federal common law of nuisance" and allowed the claims to proceed. *AEP*, 582 F.3d at 329. In reviewing that decision, the Supreme Court, as a threshold matter, agreed that federal common law governs public nuisance claims involving "'air and water in their ambient or interstate aspects.'" *AEP*, 564 U.S. at 421. The Court rejected the notion that state law could govern global warming nuisance claims, holding that "borrowing the law of a particular State would be inappropriate." *Id.* at 421-22.

This Court reached the same conclusion in *Kivalina*. There, an Alaskan city asserted public nuisance claims under federal and state law for damages from "sea levels ris[ing]" and other effects allegedly resulting from the defendants' "emissions of large quantities of greenhouse gases." 696 F.3d at 853-54. The district court dismissed the federal claims and declined to exercise supplemental jurisdiction over the state-law claims. *Id.* at 854-55. On appeal, a threshold issue was whether federal common law applied to the plaintiffs' nuisance claim. The Court, citing *AEP* and *Milwaukee I*, concluded that the case was precisely the sort of "transboundary pollution suit[]" to which "federal common law" applied. *Id.*

More recently, the Southern District of New York held that nearly identical global-warming based nuisance claims against the same five Defendants are governed by federal common law. *See City of New York v. BP P.L.C.*, 325 F. Supp.

3d 466, 471 (S.D.N.Y. 2018). Although the plaintiff argued that federal common law did not govern "because the City base[d] liability on defendants' production and sale of fossil fuels," the court held that "regardless of the manner in which the City frames its claims," the City was "seeking damages for global-warming related injuries resulting from greenhouse gas emissions, and *not* only the production of Defendants' fossil fuels." *Id.* at 471-72 (emphasis added). "Given the interstate nature of [plaintiffs'] claims," the court concluded it would "be illogical to allow the City to bring state law claims when courts have found that these matters are areas of federal concern[.]" *Id.* at 474.

b. Plaintiffs' claims are based on interstate (and worldwide) greenhouse gas emissions and thus require a uniform federal rule of decision

The district court correctly concluded that Plaintiffs' global-warming claims—like those in *AEP*, *Kivalina*, and *City of New York*—are quintessential "transboundary pollution suits" appropriately governed by federal common law. Although Plaintiffs purport to sue Defendants for their fossil-fuel production, Plaintiffs' claims are based on injuries allegedly caused by greenhouse gas emissions. *See* ER27-28 (Plaintiffs "allege that the combustion (by others) of fossil fuels produced by defendants has increased atmospheric levels of carbon dioxide"); ER30-31 (complaints address the "geophysical problem" resulting from "the combustion of fossil fuels"). Indeed, Plaintiffs justify their decision to sue these

particular Defendants on the ground that they allegedly are "collectively responsible for over eleven percent of all *carbon dioxide and methane pollution* that has accumulated in the atmosphere since the Industrial Revolution." ER14-15 (emphasis added). Plaintiffs' own allegations thus make clear that the "harm alleged … remains a harm caused by fossil fuel emissions, not the mere extraction or even sale of fossil fuels." ER19. And far from targeting local emissions, Plaintiffs' claims are based on *worldwide* greenhouse gas emissions made possible by Defendants' *worldwide* fossil fuel production and promotion.

Moreover, because Plaintiffs "seek[] damages for global warming-related injuries caused by greenhouse gas emissions," a "factfinder[] would have to consider whether emissions resulting from the combustion of Defendants' fossil fuels created an 'unreasonable interference'" with public rights. *City of New York*, 325 F. Supp. 3d at 473; *see also California v. Gen. Motors Corp.*, 2007 WL 2726871, at *8 (N.D. Cal. Sept. 17, 2007) (court could not resolve global warming-based claims against automobile manufacturers without "mak[ing] an initial decision as to what is unreasonable in the context of carbon dioxide emissions"). In short, despite Plaintiffs' efforts to make this case about fossil fuel *production*, Plaintiffs' claims inherently and necessarily depend on worldwide greenhouse gas *emissions*.

Because this transboundary pollution dispute implicates interstate and international concerns, there is an "overriding federal interest in the need for a

uniform rule of decision." *Milwaukee I*, 406 U.S. at 105 n.6. As the Department of Justice explained in its amicus brief before the district court, "[t]he United States has strong economic and national security interests in promoting the development of fossil fuels," the very conduct Plaintiffs seek to label a public nuisance, and this case "has the potential to shape and influence broader policy questions concerning domestic and international energy production and use." No. 17-cv-06011, ECF No. 244 at 1. The claims also have "the potential to interfere with the United States' ongoing attempts to address the impacts of climate change, both domestically and internationally" and to "disrupt and interfere with the proper roles, responsibilities, and ongoing work of the Executive Branch and Congress in this area." *Id.* at 2.

Allowing state law to govern would permit any plaintiff alleging injury due to global warming to proceed under each or all of the nation's 50 different state laws, thus subjecting out-of-state sources "to a variety of" "'vague' and 'indeterminate'" state common law nuisance standards and allowing states to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Ouellette*, 479 U.S. at 495-96. Plaintiffs' claims target the "transboundary problem of global warming," and thus "raise[] exactly the sort of federal interests that necessitate a uniform solution." ER31.

Plaintiffs contend there is no need for uniformity because they have "expressly disclaim[ed] any intent to regulate emissions and do not seek any

injunctive or other relief that would prevent any Defendant from continuing their existing business operations." AOB.37-38; *see also* AOB.33-34. But as the district court recognized, Plaintiffs are seeking "billions of dollars each in the form of an abatement fund," and other plaintiffs have "brought similar nuisance claims based on identical conduct." ER24. Plaintiffs' requested relief would thus "make the continuation of defendants' fossil fuel production 'not feasible.'" ER24 (quoting Restatement (Second) of Torts § 826, hereinafter "Restatement"); *see also* Restatement § 826 cmt. f. The Supreme Court has recognized that "regulation can be … effectively exerted through an award of damages," *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012), and "[s]tate power" can be wielded as much by "application of a state rule of law in a civil lawsuit as by a statute." *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 n.17 (1996). Given the obvious national interest in affordable, reliable energy, the question whether fossil fuel production is a public nuisance—and thus whether the fossil-fuel industry should be potentially crippled—demands a uniform federal answer.

The need for a uniform solution is not mitigated by the fact that "a majority of states have adopted the Restatement's definition of public nuisance." AOB.38 (quoting *AEP*, 582 F.3d at 351 n.28). Regardless whether substantial divergence exists between states' laws, the Supreme Court has insisted for over 100 years on a uniform federal rule of decision for public nuisance cases involving interstate

pollution. And even if the "legal principles" were generally the same state-to-state, AOB.38, the Court's insistence on uniformity makes sense because, as the Solicitor General explained in *AEP*, state courts could reach "widely divergent results" based on "different assessments of what is 'reasonable.'" Br. for the TVA as Resp't Supporting Pet'rs, *AEP*, No. 10-174, 2011 WL 317143, at *37 (S. Ct.); *see also N.C., ex. rel. Cooper v. TVA*, 615 F.3d 291, 298 (4th Cir. 2010) ("*Cooper*") ("If courts across the nation were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern."). The problems of applying state law to out-of-state sources "are magnified here, where the sources of emissions alleged to have contributed to climate change span the globe." *Amicus Curiae* Br. for the United States, No. 17-cv-06011, ECF No. 245 at 11; *see id.* at 10 (noting that adjudicating a global warming nuisance "claim under California law flies directly into the headwinds of *Ouellette*"). As the district court correctly observed, a "patchwork of fifty different answers to the same fundamental global issue would be unworkable." ER31.

c. The well-pleaded complaint rule does not bar removal

Plaintiffs contend that, as "master[s] of thei[r] claim[s]," they had the option to "avoid federal jurisdiction by exclusive reliance on state law." AOB.10-11. But the district court properly rejected this argument. ER33.

The well-pleaded complaint rule does not allow a plaintiff to "exalt form over substance," *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013), by affixing a state-law label to a claim that is necessarily *federal* in nature. *See Torres-Aguilar v. I.N.S.*, 246 F.3d 1267, 1271 (9th Cir. 2001) (to assess jurisdiction courts "must look beyond" a litigant's chosen "label[s]"); *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1395, 1403 (9th Cir. 1988) (plaintiff "cannot defeat removal by masking or 'artfully pleading' a federal claim as a state claim"). Consistent with precedent in other circuits, this Court has recognized that "federal jurisdiction [exists] … if the claims arise under federal common law." *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002); *see also Treiber & Straub, Inc. v. U.P.S., Inc.*, 474 F.3d 379, 383 (7th Cir. 2007) (a claim that "arise[s] under federal common law … is a permissible basis for jurisdiction based on a federal question"); *Woodward Governor Co. v. Curtiss Wright Flight Sys., Inc.*, 164 F.3d 123, 126 (2d Cir. 1999) ("[I]f federal common law governs a case, that case [is] within the subject matter jurisdiction of the federal courts."); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997) ("Federal jurisdiction exists if the claims … arise under federal common law."); *City of New York*, 325 F. Supp. 3d at 472 (claims "based on the 'transboundary' emission of greenhouse gases" "arise under federal common law and require a uniform standard of decision").

Because "dispositive issues stated in [Plaintiffs'] complaints require the application of federal common law," Plaintiffs' claims necessarily "arise[] under federal law," *Milwaukee I*, 406 U.S. at 100, and thus are removable under 28 U.S.C. §§ 1331 and 1441(a). *See ARCO Envtl. Remediation L.L.C. v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1114 (9th Cir. 2000) (federal jurisdiction exists where "the claim is necessarily federal in character").

Plaintiffs are thus wrong when they argue that the "sole exception to the well-pleaded complaint rule arises in the 'rare' case of 'complete preemption.'" AOB.11 (citing *Hansen v. Grp. Health Coop.*, 902 F.3d 1051, 1057 (9th Cir. 2018)). Complete preemption is relevant when Congress has occupied a field that would *otherwise be governed by state law*. But the claims asserted here are inherently federal in nature, and thus arise under federal law regardless of congressional action. Indeed, *Hansen* makes clear that complete preemption is merely "[t]he *most common* way"—not the only way—"that federal questions are disguised as matters of state law." 902 F.3d at 1057 (emphasis added).

Plaintiffs also contend that federal common law cannot justify removal if it does not provide "rights and remedies of its own[.]" AOB.11. But as the Supreme Court has long recognized, tort claims addressing "matters essentially of federal character" must be governed by federal law *even if* federal common law provides no remedy. *Standard Oil*, 332 U.S. at 307. In *Standard Oil*, the United States asserted

claims for subrogation or indemnification under California law, *id.* at 303 n.4, but because of the federal interests involved, the Court held that "state law should not be selected as the federal rule for governing the matter in issue." *Id.* at 310. Yet after concluding that federal common law governed, the Court declined to "exercise" the federal "judicial power," dismissing the claims so as not to "intrud[e] within a field properly within Congress' control." *Id.* at 316. As *Standard Oil* illustrates, the jurisdictional question (which law governs?) is separate from—and antecedent to—the merits question (is the claim viable?).

This Court has adopted the same choice-of-law analysis. In *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953 (9th Cir. 1996), the plaintiff filed a state-law contract claim, which the defendant removed on the ground that "contracts connected with the national security[] are governed by federal law." *Id.* at 954. In affirming the order denying remand, this Court held that "the federal interest" implicated by the claim "requires that 'the rule [of decision] must be uniform throughout the country.'" *Id.* at 955 (quoting *Am. Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640, 643 (9th Cir. 1961)). The claim was not, in essence, "a 'state law breach of contract claim,'" and jurisdiction "existed under § 1331 because the claim arose under federal common law." *Gallo v. Unknown No. of Identity Thieves*, 254 F. Supp. 3d 1096, 1102 (N.D. Cal. 2017) (discussing *New SD*, 79 F.3d at 955); *see also Sam L. Majors Jeweler*, 117 F.3d at 928-29 (removal

of state-law claims was proper because federal common law governed liability of air carriers).

d. The district court had jurisdiction even if the CAA displaces Plaintiffs' federal common law claims

Plaintiffs contend federal common law cannot provide a basis for removal because "the federal common law governing greenhouse-gas emissions has been entirely displaced by the Clean Air Act." AOB.14. To say that federal common law has been "displaced," however, is simply to say that it "does not provide a remedy." *Kivalina*, 696 F.3d at 856; *see id.* at 857 ("displacement of a federal common law right of action means displacement of remedies"); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 332 (1981) ("*Milwaukee II*") (holding that Congress's comprehensive overhaul of the CWA meant "no federal common-law *remedy* was available") (emphasis added). The absence of a federal common law remedy neither affects subject matter jurisdiction nor alters the federal character of Plaintiffs' claims. *See Allen v. Milas*, 896 F.3d 1094, 1101 (9th Cir. 2018) (the "absence of a valid … cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case").

Federal common law generally governs interstate pollution claims because it would be "inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 641; *see AEP*, 564 U.S. at 422 ("borrowing the law of a particular State" to adjudicate global

warming claim would be "inappropriate"). "[I]f federal common law exists, it is because *state law cannot be used*." *Milwaukee II*, 451 U.S. at 313 n.7 (emphasis added). Because "the basic scheme of the Constitution" precludes the application of state law to interstate pollution claims, *AEP*, 564 U.S. at 421, the displacement of federal common law by federal statute does not mean that *state law* suddenly governs these "exclusively federal" claims. *Standard Oil*, 332 U.S. at 307.

AEP and *Kivalina* direct a two-step analysis to determine *first* whether federal law governs in light of the nature of the claims, and *second* whether Plaintiffs have stated claims upon which relief may be granted. *See AEP*, 564 U.S. at 422; *Kivalina*, 696 F.3d at 855 (applying this two-step approach). This two-step approach accords with "two centuries of jurisprudence affirming the necessity of determining jurisdiction *before* proceeding to the merits." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98 (1998) (emphasis added); *see also Ruhrgas AG v. Marathon Oil, Co.*, 526 U.S. 574, 577 (1999) ("The requirement that jurisdiction be established as a threshold matter … is 'inflexible and without exception'"). Plaintiffs' motions to remand implicate the first (jurisdictional) step of the analysis, while the question of displacement implicates only the second (viability) step.

Plaintiffs contend that *AEP* supports remand because the Court there did not "invalidate the plaintiffs' *state-law* nuisance claims." AOB.15; *see also* States Br. at 12. But in *AEP* the plaintiffs' state-law claims were asserted *only* under "the law

of each State where the defendants operate[d] power plants." *AEP*, 564 U.S. at 429. The Court remanded for the lower court to determine whether those claims brought under the laws of the source states were preempted by the CAA or otherwise barred. *Id.* (citing *Ouellette*, 479 U.S. at 488). *AEP* did not suggest that, by displacing federal common law remedies, Congress somehow authorized state law to govern inherently federal claims targeting *out-of-state* emissions. Because Plaintiffs here assert claims based on *global* emissions resulting from Defendants' worldwide conduct, the claims arise under federal common law, not state law.[6]

The district court also rejected Plaintiffs' argument by concluding that Plaintiffs' federal common law claims were *not* entirely displaced. Although the CAA speaks directly to "*domestic* emissions of greenhouse gases," Plaintiffs' claims "attack behavior worldwide." ER33. And because "foreign emissions are out of the EPA and Clean Air Act's reach, the Clean Air Act did not necessarily displace plaintiffs' federal common law claims." ER19. The court thus distinguished *Kivalina*—in which plaintiffs' federal common law claims were completely

[6] Plaintiffs also incorrectly assert that *Kivalina* "left plaintiffs' state-law claims untouched." AOB.16-17. There were no state law claims before this Court in *Kivalina* because the district court declined to exercise supplemental jurisdiction over plaintiffs' state law claims, and plaintiffs did not appeal the dismissal. The concurring Judge in *Kivalina* merely recited *AEP*'s dicta, which was referring to a narrow class of claim asserted under the law of the source state. 696 F.3d at 866 (Pro, J., concurring).

displaced—on the ground that the claims in that case "sought only to reach domestic conduct." ER33.

In their briefing on the motion to dismiss, Plaintiffs praised the district court for "correctly rul[ing] that … the federal CAA does not displace a public nuisance claim against fossil fuel producers because the CAA does not apply outside the United States[.]" No. 17-cv-06011, ECF No. 235 at 9:22-24. Plaintiffs further asserted that the court "properly distinguished cases such as *AEP* and *Kivalina*, which sought to impose liability based upon emissions regulated under the CAA." *Id.* at 9:25-26. Now, in a stark reversal, Plaintiffs contend that this Court's analysis in *Kivalina* held that all federal common law claims predicated on defendants' emissions were displaced "without regard to where the fossil fuels were extracted or burned." AOB.17; *see also* AOB.18. That is wrong. In arguing against displacement, the *Kivalina* plaintiffs never raised the distinction between foreign and domestic emissions, and the Court therefore grounded its analysis in *AEP*'s conclusion "that Congress has directly addressed the issue of *domestic greenhouse gas emissions* from stationary sources and has therefore displaced federal common law." 696 F.3d at 856 (emphasis added). After concluding that displacement applies to all types of remedies, the *Kivalina* court reiterated that "*AEP* extinguished Kivalina's federal common law public nuisance damage action, along with the federal common law public nuisance abatement actions." *Id.* at 857. In other words,

Kivalina followed *AEP*—and the plaintiffs' arguments—in addressing only whether Congress had spoken directly to the issue of *domestic* emissions.

e. Plaintiffs' claims would be an unprecedented application of state-law nuisance doctrine

Attempting to avoid *AEP* and *Kivalina*, Plaintiffs contend that state law has "frequently" been applied to "remediate the in-state effects of environmental contamination." AOB.35. But Plaintiffs have not identified a single case in which a California court applied state public nuisance law to pollution emanating from another state—much less from every state and country on Earth. Plaintiffs' cases address localized nuisances, state regulations limiting emissions from in-state sources, and product liability actions with no connection to interstate pollution.

Plaintiffs rely heavily on *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51 (2017), a case in which the defendant manufacturers were required to abate a public nuisance caused by lead paint applied to houses within certain California counties. *See People v. Atl. Richfield Co.*, 2014 WL 1385823, at *13 (Cal. Sup. Ct. Mar. 26, 2014), *aff'd in part, rev'd in part sub nom People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51 (2017). Unlike here, the court held certain defendants liable because they "promoted lead pigment and/or lead paint for use on homes *within each of the Jurisdictions,* despite knowledge of the hazards of lead." *Id.* at *18 (emphasis added); *see also id.* at *21 ("ConAgra … manufactured,

promoted and sold lead paint in California from 1894 until 1948").[7] Here, by contrast, Plaintiffs seek liability for conduct occurring around the world, and they allege California-based injury resulting only indirectly from the combined worldwide effect of such conduct. ER28.

The alleged nuisance in *City of Modesto v. Dow Chemical Co.*, 19 Cal. App. 5th 130 (2018), was similarly localized. There, the city alleged that certain dry cleaning businesses had contaminated the city's groundwater by flushing a toxic chemical into the sewer. *Id.* at 135. The court held that the solvent manufacturers could be held liable because they took affirmative steps to *direct the Modesto dry cleaners* to dispose of the toxic solvents improperly. *Id.* at 149-50.

Neither *ConAgra* nor *City of Modesto* involved transboundary pollution. Accordingly, they do not support application of state law to claims based on

[7] Contrary to amici's assertion that the *ConAgra* "court had to evaluate the local threat of the nationwide marketing conduct of large multinational corporations," (States Br. at 19), the court in *ConAgra* evaluated defendants' lead-paint promotion and advertising campaigns that were "active in California." 17 Cal. App. 5th at 94; *see also id.* at 98 (describing advertisements placed in California publications).

worldwide greenhouse gas emissions resulting from Defendants' worldwide activity.[8]

Plaintiffs also assert that state law should govern because "the states have a legitimate interest in combatting the adverse effects of climate change on their residents." AOB.39-40. But states have never enjoyed "sovereign authority" (AOB.40) to regulate worldwide conduct or transboundary pollution. On the contrary, state authority to reduce pollution is limited to *in-state* sources. The cases Plaintiffs cite (at AOB.39-40) support this conclusion. In *American Fuel & Petrochemical Manufacturers v. O'Keefe*, 903 F.3d 903 (9th Cir. 2018), the court upheld a statute that "*reduce[d] Oregon's contribution* to the global levels of greenhouse gas emissions[.]" *Id.* at 912 (emphasis added). Similarly, in *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940 (9th Cir. 2019), the court upheld California fuel standards that "reduc[ed] the rate of greenhouse gas emissions *in California's transportation sector*." *Id.* at 946 (emphasis added). And in *Coalition*

[8] The nuisance cases cited in footnote 10 of the Opening Brief similarly involved localized public nuisances directly causing adjacent localized harm and thus provide no support for applying state law to Plaintiffs' global warming claims. Plaintiffs' amici note that municipalities have filed state-law public nuisance claims against manufacturers of tobacco, asbestos, guns, MTBE, lead paint, opioids, and PCB, NLC Br. at 4-7, but those cases all involved local harms allegedly caused by specific products sold or distributed to that locality. None of those cases involved transboundary *pollution claims*, which have generally been governed by federal common law.

for Competitive Electricity, Dynegy Inc. v. Zibelman, 272 F. Supp. 3d 554 (S.D.N.Y. 2017), the court upheld a New York regulation "to *reduce greenhouse gas emissions statewide* by forty percent by 2030." *Id.* at 561 (emphasis added).[9] Even if states may impose more severe regulations on *in-state* emissions, interstate pollution cases must be "resolved by reference to federal common law." *Ouellette*, 479 U.S. at 488.[10]

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[9] NLC cites (at 12-13) several other cases in which courts similarly upheld state laws regulating *in-state* conduct. *See Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 521 (7th Cir. 2018) (upholding Illinois "legislation subsidizing some of the state's nuclear generation facilities"); *Energy & Env't Legal Inst. v. Epel*, 43 F. Supp. 3d 1171, 1173 (D. Colo. 2014) (rejecting dormant Commerce Clause challenge to Colorado "provision requiring that Colorado utility companies obtain an increasing proportion of their electricity from renewable sources"); *Columbia Pac. Bldg. Trades Council v. City of Portland*, 412 P.3d 258, 261 (Or. Ct. App. 2018) (upholding local zoning ordinance that "prohibits new fossil-fuel terminals and caps the size of existing terminals within the city"). Neither these cases, nor the state statutes cited by amici states (*see* States Br. at 6-8) address the sort of transboundary pollution at issue here.

[10] Plaintiffs' reliance on *National Audubon Society v. Department of Water*, 869 F.2d 1196 (9th Cir. 1988), and *City of Philadelphia v. Lead Indus. Association*, 994 F.2d 112, 123 (3d Cir. 1993), is also misplaced. *National Audubon*, which involved a localized claim for air pollution arising from a specific source within a single state, was "essentially a domestic dispute and therefore [was] not the sort of interstate controversy which ma[de] the application of state law inappropriate." 869 F.2d at 1205. And *City of Philadelphia*, like *ConAgra*, involved lead contamination of local communities by locally-applied lead paint, thereby raising questions governed under state law. Plaintiffs also cite (at AOB.39) two products liability cases—*In re Agent Orange Products Liability Litigation*, 635 F.2d 987, 994-95 (2d Cir. 1980), and *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) (en banc)). But *Agent Orange* and *Johns-Manville* did not involve interstate pollution *or* public nuisance; the plaintiffs in those cases alleged only personal injuries

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At bottom, Plaintiffs' claims address an inherently global "geophysical problem" caused by worldwide greenhouse gas emissions. ER30. Because federal common law governs Plaintiffs' claims, Defendants properly removed under 28 U.S.C. §§ 1331 and 1441(a).

2. Plaintiffs' Claims Are Removable on Numerous Other Grounds

Defendants removed on several other grounds as well, each of which supports the district court's denial of remand.[11]

a. Plaintiffs' claims raise disputed and substantial federal issues

Federal question jurisdiction exists because Plaintiffs' claims necessarily raise disputed and substantial federal issues. *See Grable*, 545 U.S. 308; ER214-02 ¶¶22-34.

A nuisance claim under California law requires showing that "[t]he interference with the protected interest … [is] unreasonable,'" or in other words that "the gravity of the harm outweighs the social utility of the defendant's conduct."

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resulting from direct exposure to defendants' products.

[11] To the extent the Court allows Plaintiffs to incorporate by reference the Answering Brief filed by the Plaintiffs-Appellees in Nos. 18-15499, 18-15502, 18-15503, and 18-16376, Defendants hereby incorporate by reference the arguments raised by Defendants-Appellants in those cases. *See, e.g.*, No. 18-16376, ECF No. 27; *id.*, ECF No. 79.

San Diego Gas & Elec. Co. v. Super. Ct., 13 Cal.4th 893, 938 (1996). But federal agencies—including the Army Corps of Engineers and the EPA—have been weighing the costs and benefits of fossil-fuel production for decades, and any judicial balancing would necessarily "collateral[ly] attack" these agencies' decisions. *Bader Farms, Inc. v. Monsanto Co.*, 2017 WL 633815, at *3 (E.D. Mo. Feb. 16, 2017); *see also Bd. of Comm'rs v. Tenn. Gas Pipeline Co.*, 850 F.3d 714, 722-24 (5th Cir. 2017). A court cannot undertake this analysis without interpreting and applying the numerous federal statutes and regulations that speak directly to the nationwide benefits of fossil fuel production.[12] Moreover, weighing the worldwide harms and benefits of fossil-fuel production would usurp the federal government's foreign affairs power. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003). That effort raises a host of federal issues, including the interpretation of treaties and federal laws dealing with global warming.

Moreover, because "the instrumentality of the alleged harm is the navigable waters of the United States," ER25, Plaintiffs' claims necessarily arise under federal law.

[12] *See, e.g.*, 10 U.S.C. § 7422(c)(1)(B); 30 U.S.C. § 201(a)(3)(C); 43 U.S.C. § 1802(1); 30 C.F.R. § 550.120; 43 C.F.R. § 3162.1(b).

b. Plaintiffs' claims are completely preempted by federal law

Because the relief Plaintiffs seek would have the effect of curbing nationwide and global emissions, they are completely preempted by the CAA, which supplies the exclusive vehicle for challenging nationwide emissions standards. *See* 42 U.S.C. § 7607; ER220-24 ¶¶35-46. The CAA's savings clauses are inapplicable because they merely preserve state authority to "regulate to minimize the in-state harm *caused by products sold in-state*." *Rocky Mountain*, 913 F.3d at 952 (emphasis added).

Plaintiffs contend that the CAA must provide a substitute cause of action to completely preempt their claims. *See* AOB.11-12, 20. That is incorrect. Where a federal statute and regulatory scheme intend that only certain remedies are available, "the federal remedies displace state remedies." *Botsford v. Blue Cross & Blue Shield*, 314 F.3d 390, 398 (9th Cir. 2002), *amended on denial of reh'g*, 319 F.3d 1078 (9th Cir. 2003); *see Prince v. Sears Holdings Corp.*, 848 F.3d 173, 178 (4th Cir. 2017) (statute's "preemptive scope is not diminished simply because a finding of [complete] preemption will leave a gap in the relief available to a plaintiff"); *Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 46 (1st Cir. 2008).

Regardless, the CAA provides a remedy by authorizing Plaintiffs to petition the EPA to set more stringent nationwide emissions standards on greenhouse gases. *See Cal. Dump Truck Owners Ass'n v. Nichols*, 784 F.3d 500, 506 (9th Cir. 2015).

"[T]hat [Plaintiffs] cannot recover damages does not require a different conclusion or avoid complete preemption." *Prince*, 848 F.3d at 179.

c. Plaintiffs' claims arise out of operations on the Outer Continental Shelf

Removal was proper under OCSLA, which grants federal courts original jurisdiction over actions "arising out of, or in connection with … *any operation* conducted on the outer Continental Shelf which *involves exploration, development, or production* of the minerals, of the subsoil and seabed of the [OCS]." 43 U.S.C. § 1349(b)(1) (emphasis added).

Plaintiffs dispute OCSLA jurisdiction on the theory that Defendants' OCS activities were not the but-for cause of their injuries. AOB.24. But Plaintiffs seek to hold Defendants liable for their *cumulative* fossil-fuel extraction (and that of their subsidiaries), which indisputably includes all of their exploration and production of minerals on the OCS, a significant portion of domestic production. ER224-27 ¶¶48-54.

Moreover, OCSLA jurisdiction lies where the plaintiff's claims threaten to "impair the total recovery of the federally-owned minerals from the [OCS]." *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988); Plaintiffs' requested relief—billions of dollars for an "abatement fund remedy"—would substantially discourage OCS production and interfere with OCSLA's

congressionally mandated goal of obtaining the largest "total recovery of the federally-owned minerals" underlying the OCS. *Amoco*, 844 F.2d at 1210.

Federal jurisdiction is also proper because federal law applies "to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State," *i.e.*, a federal enclave. 43 U.S.C. § 1333(a)(1). Even though OCSLA allows federal courts to borrow the laws of states adjacent to the OCS "[t]o the extent that they are applicable and not inconsistent with" federal law, any borrowed state laws "are declared to be the *law of the United States*." *Id.* § 1333(a)(2)(A) (emphasis added). Accordingly, even if the Court were to borrow California law, the governing law would be federal and the claims would arise under section 1331.

d. Plaintiffs' claims arise on federal enclaves

Federal jurisdiction is proper here because "pertinent" events giving rise to liability—namely, large amounts of fossil fuel extraction—occurred on federal enclaves. *Jamil v. Workforce Res., LLC*, 2018 WL 2298119, at *4 (S.D. Cal. May 21, 2018); *see also Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006). ER231-33 ¶¶63-66.

e. The actions are removable under the federal officer removal statute

Federal jurisdiction also exists because Plaintiffs' suits are brought against "person[s] acting under" officers of the United States. 28 U.S.C. § 1442(a)(1); *see* ER227-31 ¶¶55-62. Defendants' obligations to the federal government extend far

beyond "mere compliance" with federal law, AOB.23, and instead typify the "unusually close" federal oversight necessary to invoke federal jurisdiction. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 153 (2007). The Navy's Unit Plan Contract with Chevron predecessor Standard Oil obligated Standard to operate the Elk Hills Reserve in such a manner as to produce "not less than 15,000 barrels of oil per day," SER28 §4(b), and granted the Navy "*exclusive control* over the exploration, prospecting, development and operation of the [Elk Hills Naval Petroleum] Reserve," SER27 §3(a), and "*full and absolute power* to determine … the quantity and rate of production from, the Reserve," SER28 §4(a) (emphasis added). Far from "ordinary," AOB.23, these detailed obligations reflect the federal "subjection, guidance, or control" necessary to invoke federal jurisdiction. *Watson*, 551 U.S. at 151.

f. The actions were properly removed under the bankruptcy removal statute

These actions, which seek billions of dollars, are "related to" numerous bankruptcy cases. *See* ER233-35 ¶¶67-69; 28 U.S.C. §§ 1334(b), 1452(a). The claims do not fall within the police or regulatory power exemption because Plaintiffs seek billions of dollars "to protect the government's pecuniary interest." *City & Cty. of S.F. v. PG&E Corp.*, 433 F.3d 1115, 1124 & n.9 (9th Cir. 2006).

g. Plaintiffs' claims arise under the district court's admiralty jurisdiction

The district court had admiralty jurisdiction because the alleged torts were caused in part by "vessel[s] on navigable water" and the allegedly tortious conduct "bears a significant relationship to traditional maritime activity." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 533-34 (1995).

II. The District Court Correctly Dismissed Plaintiffs' Claims for Failure to State a Claim

The district court dismissed Plaintiffs' claims under Rule 12(b)(6) on two grounds. *First*, to the extent the claims target domestic emissions, they are displaced by the CAA. ER19. *Second*, to the extent the claims "touch on foreign affairs," federal common law provides no remedy. ER25.[13] The court's decision to "stay its hand in favor of solutions by the legislative and executive branches," ER26, was correct in light of the Supreme Court's decisions in *AEP, Jesner*, *Kiobel*, and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The amended complaints suffer from

[13] Although Plaintiffs continued to assert claims under state law, the court held that "[f]or the reasons stated in the February 27 order denying remand, … plaintiffs' nuisance claims must stand or fall under federal common law." ER25. The Court should affirm that ruling for the reasons stated above. *Supra* II.A. But even if the state-law claims were not governed by federal common law, dismissal was warranted because the CAA would preempt any global warming claims properly pleaded under state law (to the extent any such claims could exist). *See supra* II.B.2; Br. of United States as Amicus Curiae in Support of Appellees, *City of N.Y. v. BP P.L.C.*, No. 18-2188, 2019 WL 1112108, at *7-13 (2d Cir. 2019).

several other fatal defects requiring dismissal, including that the claims are barred by the First Amendment because they target protected speech—namely, Defendants' lobbying activity directed at Congress and the Executive Branch. Plaintiffs have also failed to adequately plead that Defendants' allegedly tortious conduct was unauthorized; that Defendants had control over the instrumentality of the harm; or that Defendants' conduct was the actual or proximate cause of their alleged injuries.

A. Plaintiffs' Federal Common Law Claims Are Displaced by Federal Statute to the Extent They Assert Injury from Domestic Activities

The district court held, and Plaintiffs agree, that nuisance claims based on greenhouse-gas emissions from domestic sources are completely displaced by the CAA. ER19; AOB.14-18.[14] This is because adjudicating a public nuisance claim based on greenhouse gas emissions—"as with other questions of national or international policy"—would require "complex balancing" of "competing interests." *AEP*, 564 U.S. at 427. "Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance." *Id.* at 427. Federal courts are precluded from undertaking such

[14] Plaintiffs now contend that the CAA displaces even the portion of their claims addressing *foreign emissions*. AOB.17-18. Although this too would require affirmance, given that displacement affects remedies and not jurisdiction, *see supra* II.A.4—Defendants agree with the district court's conclusion that "foreign emissions are out of the EPA and Clean Air Act's reach." ER19.

"complex balancing" because Congress has "delegated to EPA the decision whether and how to regulate carbon-dioxide emissions[.]" *Id.* at 426.

Plaintiffs' federal common law claims, insofar as they focus on domestic conduct, are indistinguishable from the claims rejected in *AEP* and *Kivalina* because "[t]he harm alleged by [the] plaintiffs remains a harm caused by fossil fuel *emissions*, not the mere extraction or even sale of fossil fuels." ER19. "If an oil producer cannot be sued under the federal common law for [its] own emissions, *a fortiori* [it] cannot be sued for someone else's." ER19. This Court should thus affirm the district court's conclusion that Plaintiffs' claims are displaced by the CAA to the extent they are based on domestic emissions.

Even framed as a case exclusively about oil and gas *production*, Plaintiffs' claims have been displaced by the numerous federal statutes that "speak[] directly to [the] question" at issue here, *AEP*, 564 U.S. at 424—namely, whether fossil fuel production unreasonably interferes with public rights. That "determination" "involves 'the weighing of the gravity of the harm against the utility of the conduct.'" ER18 (quoting Restatement § 821B cmt. e.); *see also* Restatement § 828 cmt. a ("[I]t is necessary to consider the social value that the law attaches to the primary purpose of the conduct[.]").

Federal courts may not undertake that inquiry because Congress has already done so, declaring it "the goal of the United States" both to "reduce … environmental

impacts (including emissions of greenhouse gases)" *and* "to strengthen national energy security by reducing dependence on imported oil." 42 U.S.C. § 13401; *see also* 42 U.S.C. § 17001 *et seq.* (seeking ways to reduce greenhouse gas emissions); 42 U.S.C. § 13389(c)(1) (same). Rather than limiting production, Congress has directed the Secretary of Energy "to increase the recoverability of domestic oil resources," *id.* § 13411(a), and declared "oil shale, tar sands, and other unconventional fuels" to be "strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports." 42 U.S.C. § 15927; *see also* 30 U.S.C. § 21a; 43 U.S.C. § 1701(a)(12). Far from being a public nuisance, Congress has declared fossil-fuel production a vital national priority. A federal court is not authorized to subvert that determination.

Congress has also spoken directly to the issue of misleading advertising, displacing any conceivable federal nuisance claim based, in part, on Defendants' advertising. The Federal Trade Commission Act makes "unlawful" any "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). More recently, Congress has enacted the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007, which both speak directly to misrepresentation in the promotion of fossil fuels. 15 U.S.C. § 717c-1 (forbidding "any manipulative or deceptive device or contrivance" "in connection with the

purchase or sale of natural gas"); 42 U.S.C. § 17301 (forbidding "any manipulative or deceptive device or contrivance" "in connection with the purchase or sale of crude oil[,] gasoline or petroleum distillates"); *see also* 16 C.F.R. § 317.3. These statutes displace any federal common law cause of action that might otherwise address misleading promotion of fossil fuels.[15]

B. Plaintiffs' Federal Common Law Claims Are Not Viable to the Extent They Are Based on Foreign Conduct

Because the CAA applies only domestically, the statute does not displace claims that arise from conduct abroad. ER19. For this reason, Plaintiffs below "shift[ed] their focus to sales of fossil fuels worldwide, beyond the reach of the EPA and the Clean Air Act." ER20. But as the district court observed, this shift "runs counter to another cautionary restriction, the presumption against extraterritoriality," ER20, which stems from the recognition that "courts should be 'particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs,'" ER21 (quoting *Sosa*, 542 U.S. at 727). Plaintiffs' claims—which seek "billions of dollars to abate the localized effects of an inherently global phenomenon," ER21—"would effectively allow plaintiffs to govern conduct and

[15] To the extent Plaintiffs' claims are based on alleged misstatements to shareholders or the SEC, *see, e.g.*, ER101-02 ¶115, ER105-06 ¶¶120-23, they are displaced by the securities laws. *See* 15 U.S.C. § 77a *et seq.*; *id.* § 78a *et seq.*; 17 C.F.R. § 240.10b-5.

control energy policy on foreign soil," ER21. The district court thus concluded that "[n]uisance suits in various United States judicial districts regarding conduct worldwide are less likely to solve the problem and, indeed, could interfere with reaching a worldwide consensus." ER22.

Plaintiffs do not challenge the general principles articulated by the district court. Nor could they. As the Supreme Court recognized just last year, "judicial caution under *Sosa* 'guards against our courts triggering … serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.'" *Jesner*, 138 S. Ct. at 1407 (quoting *Kiobel*, 569 U.S. at 124). After all, "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns," *id.* at 1403, and they "alone ha[ve] the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain," *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). Because "attempts by federal courts to craft remedies" to international problems like global warming "would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution." *Sosa*, 542 U.S. at 727-28. Indeed, courts are loathe "to run interference in such a delicate field of international relations [absent] the affirmative intention of the Congress clearly expressed." *Benz*, 353 U.S. at 147; *see also Sosa*, 542 U.S. at 727.

Such "judicial caution" is especially appropriate here given that Plaintiffs seek a ruling that Defendants' fossil-fuel production—which is "lawful in every nation," and which "many foreign governments actively support," ER21—is a public nuisance that can be penalized to the tune of billions of dollars in this action alone, let alone in the countless other cases that could be brought by municipalities under Plaintiffs' theory. Moreover, as the district court noted, "[g]lobal warming is already the subject of international agreements," and the United States is engaged "in active discussions with other countries as to whether and how climate change should be addressed through a coordinated framework." ER22. Plaintiffs' novel theory, if blessed by this Court, would undermine these diplomatic efforts.[16]

In deciding to exercise judicial caution, the district court noted that the "principles underlying the presumption against extraterritoriality"—a canon of construction typically used to interpret statutes—"also constrain courts considering claims" under federal common law. ER21 (citing *Kiobel*, 569 U.S. at 116). The "presumption 'serves to protect against unintended clashes between our laws and

[16] Amici lament the "current administration's efforts to walk away from the Paris Agreement," and contend that "prudent adjudication" of this case may "enhance U.S. diplomatic efforts by reinforcing U.S. credibility with respect to the climate problem." Former Government Officials Br. at 18-19. But tort law cannot be used to correct perceived deficiencies in the current administration's foreign policy. Amici's argument only confirms that the district court correctly stayed its hand so as not to trench on the authority of the political branches.

those of other nations' and 'helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.'" ER21 (quoting *Kiobel*, 569 U.S. at 115-16); Like the judicial caution shown by courts wading into foreign affairs, the presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *see also Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). "These concerns … are all the more pressing when the question is whether a cause of action … reaches conduct within the territory of another sovereign." *Kiobel*, 569 U.S. at 117.

Plaintiffs and their amici insist that these principles do not apply here, but they are wrong. ***First***, they assert that "[t]he presumption against extraterritoriality, a canon of federal *statutory* construction, has never been applied to state common law torts." AOB.43 (emphasis in original); *see also* Conflicts Professors Br. at 4-7. But there are no "state common law torts" at issue here—Plaintiffs' claims necessarily arise under federal law. *See supra* II.A. Moreover, as the Supreme Court held in *Kiobel*, "the principles underlying the canon … similarly constrain courts considering causes of action that may be brought" under federal common law. 569 U.S. at 116. Far from holding that the common-law nature of such claims frees courts from the presumption against extraterritoriality, the Court in *Kiobel* explained

that "the danger of unwarranted judicial interference in the conduct of foreign policy is *magnified* in the context of [common law claims brought under] the ATS, because the question is not what Congress has done but instead what courts may do." *Id.* (emphasis added). Plaintiffs' amici are thus incorrect in arguing that the presumption is inapplicable where there is "no statute to interpret and no legislative intent to ascertain." Conflicts Professors Br. at 9.

Second, Plaintiffs contend that even if the presumption against extraterritoriality applies, "that presumption would be overcome by the fact that at least some of Defendants' challenged conduct and all of the People's claimed injury occurred within the United States." AOB.44; *see also* AOB.42 (contending that "[n]either *Kiobel* nor *Sosa* has any application" because "plaintiffs are California public entities" suing for "in-state harms resulting from conduct that occurred in California as well as elsewhere"). But to the extent Defendants' conduct occurred in the United States, Plaintiffs' claims have been displaced by statute, *see supra*

III.A, so the only relevant conduct is that occurring overseas.[17] The relevant question is thus whether a federal court should create a new common law remedy for harms allegedly caused entirely by overseas conduct. That is exactly what the Supreme Court warned against in *Jesner*. 138 S. Ct. at 1407.

Third, Plaintiffs assert that "[i]f the district court were right, no public entity could ever bring any civil claim in the United States, in any court or under any body of law, that related in any way to harms caused by climate change … given its worldwide scope and effects." AOB.46. But "[n]o plaintiff has ever succeeded in bringing a nuisance claim based on global warming" ER17, and there is no reason for the Court to invent a novel federal common law remedy for *this case*, which would inject federal courts into an area replete with federal interests and international consequences. Of course, nothing prevents Congress from creating a cause of action for global warming-based injuries, but unless and until it does so,

[17] Plaintiffs contend that "[i]n a public nuisance case, like any other case involving injury to property, the focus of concern is where that injury occurred." AOB.44. But the law of nuisance focuses at least as much on the conduct at issue as on the alleged harm. Liability will be imposed if "the gravity of the harm outweighs *the utility of the actor's conduct*." Restatement § 826 (emphasis added). None of Plaintiffs' cases are to the contrary. *New Jersey v. City of New York*, 283 U.S. 473 (1931), simply held that "[t]he situs of the acts creating the nuisance … is of no importance" in determining "the Court's territorial *jurisdiction*." *Id.* at 482 (emphasis added). Similarly, *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1003-04 (9th Cir. 1987), merely stated that a court should apply the law of the place of injury—here, federal common law.

federal courts should "respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed by those branches." ER26.

C. The Claims Are Barred by the First Amendment

Plaintiffs contend that Defendants are liable for public nuisance because they "wrongfully promote[d]" fossil fuels even though they supposedly knew about the risks of greenhouse-gas emissions. AOB.1. Plaintiffs highlight their promotion allegations throughout the Opening Brief. *See* AOB.24, 29, 32, 33, 35, 37, 40, 41 n.12, 47, 52. But as explained earlier, Plaintiffs' "promotion" allegations cannot save their claims, which are inherently based on alleged injuries caused by *emissions*. *Supra* II.A. Moreover, Plaintiffs' reliance on Defendants' so-called "promotion" introduces a further problem: the "wrongful" conduct alleged is constitutionally protected speech immunized by the First Amendment. *See E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965). For that reason, at the hearing on Defendants' motion to dismiss, "Plaintiffs' counsel clarified" that promotion was *not* an essential element of their claims, but "merely a 'plus factor.'" ER16. The district court recognized that this backtrack was "aimed at avoiding the *Noerr-Pennington* doctrine and other free speech issues inherent in predicating liability on publications designed to influence public policy." ER17 n.6. To the extent Plaintiffs

now seek to backtrack from their previous backtrack, their claims—whether governed by federal or state law—once again run headlong into *Noerr-Pennington*.

Plaintiffs allege that Defendants engaged in an aggressive public relations campaign "to deny and discredit the mainstream scientific consensus on global warming," and paid individuals and "denialist groups" millions of dollars "to launch repeated attacks on mainstream climate science" and discredit the "1995 and 2001 conclusions" of the Intergovernmental Panel on Climate Change ("IPCC"). ER60 ¶6, ER98 ¶ 103, ER100 ¶¶110-11. Even assuming the truth of these loaded characterizations, the alleged conduct was constitutionally protected. The IPCC was created to provide *governments* with information about climate change, *see* Structure, IPCC, https://www.ipcc.ch/about/structure/, leaving little doubt that Defendants' alleged criticisms of "IPCC conclusions" were directed toward government entities.[18]

Plaintiffs' own amici highlight the extent to which Defendants' allegedly misleading statements came in the context of First Amendment-protected lobbying activities. *See* Senators Br. at 7 (claiming that Defendants have engaged in

[18] Although Plaintiffs claim that Defendants' publicity campaign bore a "striking resemblance to Big Tobacco's propaganda campaign to deceive the public," ER98 ¶103, Plaintiffs did not identify a single *consumer-targeted* advertising campaign urging use of their products—television commercials, billboards, print advertisements, etc.—in which Defendants discussed climate change.

"extensive, decades-long opposition to congressional, executive, and international efforts to limit their carbon emissions"); Former Government Officials Br. at 2-3 (alleging efforts to "undercut the IPCC's findings").[19] But even assuming the allegations were accurate, the so-called "promotional" activity Defendants allegedly undertook to "discredit the growing body of scientific evidence" (AOB.4) would be nothing more than constitutionally protected lobbying activity under *Noerr-Pennington*, which immunizes "publicity campaign[s] directed at the general public, seeking legislation or executive action[.]" *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988); *see also New W., L.P. v. City of Joliet*, 491 F.3d 717, 722 (7th Cir. 2007) ("[T]he holding of *Noerr* is that lobbying is protected whether or not the lobbyist used deceit.").[20]

[19] Plaintiffs and their amici even rely on alleged lobbying activities conducted by the same industry groups. *Compare* ER99-100 ¶¶105-08, *with* Senators Br. at 27-29; *compare* ER101-3 ¶¶113, 117, *with* Senators Br. at 16-17. Although Plaintiffs and the Senators attribute those organizations' alleged statements to Defendants, "[a] member of a trade group or other similar organization does not necessarily endorse everything done by that organization or its members." *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1290 (3d Cir. 1994)).

[20] Although the Supreme Court has recognized a "sham" exception where a defendant's "activities are not genuinely aimed at procuring favorable government action," *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991), Plaintiffs do not contend that Defendants' alleged attempts to influence public policy were insincere.

Even if Plaintiffs' claims were based on Defendants' consumer-facing advertising campaigns—none of which is alleged to address global warming—they are foreclosed by the First Amendment, which protects "the free flow of commercial information." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). And although Plaintiffs may disagree with the point of view allegedly expressed by some Defendants in public communications, "[d]iscussion of public issues … [is] integral to the operation of [our] system of government." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Because Plaintiffs' requested remedy would have a "'chilling' effect … antithetical to the First Amendment's protection of true speech on matters of public concern," *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986), their claims fail as a matter of law.

D. Plaintiffs Failed to Plead Nuisance Claims Adequately

Setting aside the alleged constitutionally-protected "promotion" activities, Plaintiffs' claims are based on nothing more than Defendants' "otherwise lawful and everyday sales of fossil fuels, combined with an awareness that greenhouse gas emissions lead to increased global temperatures." ER16-17. The Court should reject such claims for at least three reasons: (1) Defendants' conduct is authorized by statute; (2) Defendants did not control the instrumentality of the nuisance at the time it created the injury; and (3) Plaintiffs have failed to adequately allege causation.

1. Defendants' conduct is authorized (and encouraged) by law

A claim of public nuisance requires "an unreasonable interference with a right common to the general public." Restatement § 821B(1); *see AEP*, 582 F.3d at 328. Conduct expressly sanctioned by statute cannot be deemed "unreasonable." *See* Restatement § 821B cmt. f.

Congress has been aware of the risk of man-made global warming for decades, during which time it continued to authorize and encourage fossil-fuel production. *See supra* at III.A; 42 U.S.C. §§ 15903, 15904, 15909(a), 15910(a)(2)(B). California also authorizes Defendants' conduct, mandating that the Public Utilities Commission "shall … encourage, as a first priority, the increased production of gas in this state[.]" Cal. Pub. Util. Code § 785; *see also* Cal. Pub. Res. Code § 3106(b) (declaring it "the policy of this state" to maximize fossil-fuel production). Because federal and state laws authorize Defendants' conduct, their actions "cannot be a public nuisance." *Cooper*, 615 F.3d at 309-10.

2. Plaintiffs' federal common law claims fail because Defendants did not have sufficient control over the product allegedly causing the public nuisance

Federal courts adjudicating public nuisance actions have "turned to the Restatement" for guidance on the elements of the claim. ER17. Courts following the Restatement have held that a defendant must "have *control* over the instrumentality causing the alleged nuisance *at the time the damage occurs*" to be

liable for public nuisance. *State v. Lead Indus. Ass'n*, 951 A.2d 428, 449 (R.I. 2008) (relying on Restatement to dismiss lead-paint public nuisance claims because plaintiffs failed to allege "that defendants had control over the lead pigment at the time it caused harm to children"); *see also In re Lead Paint Litig.*, 924 A.2d 484, 498-99 (N.J. 2007); *Camden Cty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540-41 (3rd Cir. 2001); *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993).

Here, Plaintiffs concede that third-party "*use* of fossil fuels"—not Defendants' alleged extraction, production, and promotion—"is the primary source of the greenhouse gas pollution that causes global warming." ER59 ¶2; *see also* AOB.1 (blaming "the continued burning of fossil fuels"). Plaintiffs did not (and could not) assert that Defendants had control over the petroleum products at the time those products allegedly created the nuisance. Without such control, "a basic element of the tort of nuisance is absent" because, "after the time of manufacture and sale, [Defendants] no longer had the power to abate the nuisance." *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646, 656 (D.R.I. 1986).

3. Plaintiffs failed to adequately plead causation under federal common law

Causation is a necessary element of a public nuisance claim. *See In re Exxon Valdez*, 270 F.3d 1215, 1253 (9th Cir. 2001). Plaintiffs failed to allege facts

establishing that Defendants were the cause-in-fact or the proximate cause of their alleged injuries.

The Restatement has adopted the "substantial factor" test, under which an act will be considered to have caused the injury only where the injury would not have happened but for the act. Restatement § 432(1). Plaintiffs have not alleged that their injuries would have been avoided if Defendants—who are alleged to account for roughly 11% of industrial greenhouse gas emissions, ER90 ¶ 94(c)—had stopped producing fossil fuel products, reduced production, or warned the public about the possible risks of global warming. Nor could they, as the "undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time … make[] clear that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular [action] by any specific person, entity, [or] group at any particular point in time." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 880 (N.D. Cal. 2009); *see also Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 1135 (D.N.M. 2011) ("[C]limate change is dependent on an unknowable multitude of [greenhouse gas] sources and sinks, and it is impossible to say with any certainty that Plaintiffs' alleged injuries were the result of any particular action or actions by Defendants").

Moreover, if Defendants had decreased their activities, the many other unnamed producers of fossil fuels across the globe would likely have increased production to meet worldwide demand. *See Sierra Club v. U.S. Def. Energy Support Ctr.*, 2011 WL 3321296, at *5 (E.D. Va. July 29, 2011) (plaintiff failed to show that "if there had been a reduction in the amount of greenhouse gases emitted by producers of fuel from oil sands crude, those reductions would not have been offset by increased emissions elsewhere on the planet"). Plaintiffs tout that they have not sued any "foreign government or state-owned compan[ies]," AOB.46, but that omission merely confirms that judicial action would punish domestic energy companies, enrich foreign oil producers, handicap diplomatic efforts to combat global warming, and increase reliance on foreign oil—all without making a dent in global emissions.

Plaintiffs have similarly failed to plead proximate causation, as the allegations do not demonstrate a "direct relationship between the injury and the alleged wrongdoing." *Or. Laborers-Emp'rs Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957, 963 (9th Cir. 1999). It is a "uniformly accepted principle[] of tort law" that a plaintiff must "prove more than that the defendant's action triggered a series of other events that led to the alleged injury." *Benefiel v. Exxon Corp.*, 959 F.2d 805, 807 (9th Cir. 1992). Plaintiffs' global warming claims are "dependent on a series of events far removed both in space and time from the Defendants'" alleged

misconduct, *Kivalina*, 663 F. Supp. 2d at 881, and Defendants therefore "did not directly cause any injury," *Benefiel*, 959 F.2d at 807; *see also Philip Morris*, 185 F.3d at 963; Restatement § 433 cmt. f; *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 868 (S.D. Miss. 2012) ("The assertion that the defendants' emissions combined over a period of decades or centuries with other natural and man-made gases to … damage personal property is precisely the type of remote, improbable, and extraordinary occurrence that is excluded from liability."). Accordingly, this Court could affirm based on Plaintiffs' failure to adequately plead causation.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment below.

Dated: May 10, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Local Rule 28-2.6(c), Appellee Chevron identifies the following related appeals, which have been consolidated: *County of San Mateo, et al. v. Chevron Corp., et al.*, No. 18-15499, *City of Imperial Beach v. Chevron Corp.*, No. 18-15502, *County of Marin v. Chevron Corp.*, No. 18-15503, and *County of Santa Cruz v. Chevron Corp.*, No. 18-16376.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Dated: May 10, 2019

/s/ *Theodore J. Boutrous, Jr.*
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